IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 75 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

INDIAN FARMERS FERTILIZER CO. OP. LTD.

Versus

CARGO CLEARING AGENCY

Appearance:

SINGHI & BUCH ASSO. for Petitioner

MR CH VORA for Respondent No. 1

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 21/06/2001

ORAL JUDGEMENT

1. Rule. Learned advocate Mr.C.H.Vora, who has appeared on behalf of the respondent by way of caveat, waives service of rule.

2. The petitioner has challenged the legality, validity and propriety of the order dated 30/09/1998 passed by learned Civil Judge (S.D.), Gandhidham, District : Kutch below Ex.11 and 16 in the proceedings of Special Civil Suit No.19 of 1996.

3. The present petitioner is the original defendant and the respondent is the original plaintiff. For the sake of clarity, the parties are referred to as "the plaintiff" and "the defendant" hereinafter.

The defendant had invited tenders for clearing, forwarding, handling, and stevedoring of MOP vessels at Kandla port and for loading and discharge of cargo into trucks and dumpers for onward transportation to the plant of defendant. The plaintiff as the contractor had offered its bid which was accepted by the defendant and a contract dated 11/2/1994 was entered into between the defendant and plaintiff on the terms and conditions contained in the said contract.

It is undisputed that the terms of the contract contained vide Article-24 an arbitration agreement which relates to resolution of dispute between the parties through arbitration of a person appointed by the defendant. That any award made under such arbitration shall be final, conclusive and binding to the parties. That the Arbitrator to be appointed is specifically authorized by the parties to enlarge time from time to time for making the award. The venue of such arbitration is agreed to be at Delhi. And such arbitration shall be governed by the provisions of Indian Arbitration Act, 1940 or any statutory modification or enactment thereof for the time being in force.

4. That the plaintiff-contractor raised the dispute in terms of Article-24 of the contract and accordingly sought the settlement of the dispute by appointing an Arbitrator. The plaintiff-contractor, therefore filed an application under Section 20 of the Indian Arbitration Act, 1940 before Court of the Civil Judge (S.D.), Gandhidham, which was registered as Special Civil Suit No.19 of 1996.

5. That in response to the notice of the said suit, the defendant filed an application Ex.11 inter alia contending that the application preferred by the plaintiff was not maintainable, as the Indian Arbitration Act, 1940 has been repealed and the Arbitration and Conciliation Act, 1996 has come into force from 26/01/1996 and as such, the suit filed by the plaintiff

on 20/2/1996 seeking appointment of an Arbitrator under Section 20 of the Indian Arbitration Act, 1940 is not maintainable and the Civil Court has no jurisdiction to entertain the said suit, and therefore, the same be dismissed with costs.

6. That the plaintiff-contractor also filed an application Ex.16 under the provisions of Order-6, Rule-17 read with Section 151 of the Code of Civil Procedure, seeking permission to amend the plaint regarding the narration of the Act and the section, as contained in para-(13) of the plaint and also claimed permission for substituting the words "Application under Section 20 of the Arbitration Act, 1940" by the words "Application under Section 8 of the Arbitration and Conciliation (Ordinance), 1996".

7. That the trial Court heard both the applications together and by impugned order rejected the application Ex.11 of the defendant and allowed the application of the plaintiff. Being aggrieved by the said order, the original defendant has filed the present Revision Application.

8. On behalf of the defendant/petitioner the learned advocate Mr.Buch has submitted that impugned order is bad in law, as it is passed without application of mind or assigning any reasons in respect to rejection of application Ex.16 of the defendant and granting the application Ex.11. Section 37 of Arbitration Act, 1940, is referred to so as to establish the point of time for limitation regarding the commencement of Arbitration proceedings. It is contended by learned advocate Mr.Buch on behalf of the petitioner that the arbitration proceedings shall be deemed to have commenced when the Arbitrator indicates his willingness to act as such and, thereby in the instant case before the commencement of arbitration proceedings, Arbitration and Conciliation Act, 1996 has come into force on 26/1/1996, that is prior to filing of the suit. The trial court ought to have held that the suit as filed is not tenable at law and the trial Court ought to have dismissed the suit. Mr.Buch has placed reliance on the observations made by the Hon'ble Supreme Court in the case of The Secretary to the Government of Orissa and another v/s. Sarbeswar Rout, reported in AIR 1989 S.C. 2259, in para-(8) to support the submission that commencement of arbitration proceedings would be when willingness is shown by an Arbitrator to enter into the reference.

9. As against that learned advocate Mr.C.H.Vora

appearing on behalf of the respondent has submitted that the trial Court has rightly allowed the application Ex.16 of the plaintiff and has rejected the application Ex.11 on correct interpretation of the provisions of law. As per the facts and circumstances of the case, notice was served on 25/10/1994 by the plaintiff-contractor to defendant/petitioner for a reference to the designated Arbitrator as per Arbitration agreement, which was prior to the date of commencement of the new Act (26/1/1996). That thereby, the proceedings of the suit would be governed by the old Act i.e. Arbitration Act, 1940. To support the submission reliance is placed on the observations made by the Hon'ble Apex Court in the case of M/s.Shetty's Constructions C. Pvt. Ltd., v/s. M/s.Konkan Railway Construction and another., reported in AIR 1999 S.C. 1535.

10. It is undisputed that the suit dispute between the parties is referable to an Arbitrator as per Article-24 of the contract. It is also undisputed that plaintiff-contractor raised a dispute and served a notice dated 25/10/1994 for a reference to the designated Arbitrator in respect to resolution of the said dispute. It is also undisputed that the present petitioner/defendant did not reply to the said notice of the plaintiff agreeing for a reference to the designated Arbitrator and without filing any written statement, filed an application Ex.11 claiming to dismiss the suit. In the said matrix of the fact scenario, observations as made by Supreme Court in the case of M/s.Shetty's Constructions C. Pvt. Ltd., v/s. M/s.Konkan Railway Construction and another.(Supra) vide para-(4) as extracted hereunder is relevant and material :-

"A mere look at sub-section (2)(a) of Section 85 shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the new Act. The new Act came into force on 26/01/1996. The question therefore, arises whether on that date the arbitration proceedings in the instant four suits had commenced or not. for resolving this controversy we may turn to S.21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. Therefore, it must be found out

> whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents after 26-1-1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of S.21 and S.85(2)(a) of the new Act, it must be held that these proceedings will be governed by the old Act. As seen from the aforenoted factual matrix, it at once becomes obvious that the demand for referring the dispute for arbitration was made by the petitioners in all these cases months before 26-1-1996, in March and April, 1995 and in fact thereafter, all the four arbitration suits were filed on 24-8-1995. These suits were obviously filed prior to 26-1-1996 and hence they had to be decided under the old Act of 1940. All four suits will be governed by the Arbitration Act, 1940."

The above stated observations make it quite clear that the date of notice requesting for referring the dispute for arbitration is the date of commencement of arbitration proceedings, in view of the provisions contained in Section 85(2)(a) read with Section 21 of the Arbitration and Conciliation Act, 1996. In the instant case the suit dispute would be governed by the provisions of Arbitration Act, 1940. As the Arbitration proceedings had commenced prior to the commencement of the new Act, which came into force on 26/1/1996.

11. Under such circumstances, application Ex.11 moved by the defendant/petitioner in the proceedings of Special Civil Application No.19 of 1996 could not be granted according to law and even if no proper reasons are assigned by the trial Court, there is no failure of justice or any cause for interference by the Revisional Court and as such, the Revision fails and stands disposed of as rejected with no order as to costs. Rule is discharged.

(A.K.Trivedi,J.)

(vrpanchal)